Lembaga Tatatertib Peguam-Peguam lwn Hoo Lin Coln dan satu lagi

MAHKAMAH PERSEKUTUAN (PUTRAJAYA) — RAYUAN SIVIL NO 02–8 TAHUN 2006(W)
NIK HASHIM, AUGUSTINE PAUL DAN ABDUL AZIZ MOHAMAD HHMP
28 AUGUST 2008

Profesion Undang-Undang — Prosiding tatatertib — Lembaga Tatatertib — Permohonan untuk mencelah dalam rayuan oleh Majlis Peguam — Sama ada Majlis Peguam mempunyai kepentingan dalam rayuan — Sama ada hak Majlis Peguam akan terjejas dengan keputusan yang akan dibuat

Prosedur Sivil — Pencelahan — Permohonan — Majlis Peguam Malaysia memohon kebenaran mencelah dalam rayuan — Sama ada permohonan boleh dibuat di mana-mana peringkat rayuan — Sama ada kebenaran akan mewujudkan penduaan pihak-pihak — Sama ada kelewatan permohonan tidak munasabah untuk mewajarkan kebenaran mencelah

Melalui notis usul kandungan 48(a) ('permohonan'), Majlis Peguam Malaysia ('Majlis Peguam'), bakal pencelah, telah memohon untuk mendapatkan kebenaran bagi mencelah dalam rayuan ini di bawah s 103E Akta Profesion Undang-Undang 1976 ('Akta'). Permohonan tersebut disokong oleh afidavit deponen bagi pihak Majlis Peguam manakala responden pertama telah membantah permohonan tersebut. Responden pertama merayu kepada Mahkamah Tinggi terhadap perintah daripada perayu yang mensabitkan responden pertama kerana salah laku di bawah s 94 Akta tersebut dan seterusnya perayu selaras dengan s 103C memerintah agar nama responden pertama dikeluarkan daripada daftarai. Responden pertama memfailkan notis rayuan terhadap keputusan perayu di Mahkamah Tinggi. Notis usul untuk penggantungan perintah perayu telah diserahkan kepada Majlis Peguam oleh responden pertama. Mahkamah Tinggi pada 30 September 2005 telah membenarkan permohonan penggantungan sementara terhadap keputusan perayu. Responden pertama, kemudian pada 24 Oktober 2005 menyerahkan rekod rayuan kepada Majlis Peguam dan memaklumkan tarikh pendengaran rayuan di Mahkamah Tinggi yang ditetapkan tetapi tiada perwakilan daripada Majlis Peguam hadir pada tarikh tersebut. Mahkamah Tinggi telah membenarkan rayuan responden pertama. Perayu seterusnya merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Tinggi. Perayu pada

4 Disember 2006 telah menyampaikan rekod rayuan tersebut kepada Majlis Peguam. Pada 11 Disember 2007, Majlis Peguam memfailkan permohonan bagi mendapatkan kebenaran mencelah berpandukan peruntukan s 103E Akta tersebut yang membolehkan Majlis Peguam atas budi bicaranya membuat permohonan pada mana-mana peringkat dalam mana-mana rayuan.

Diputuskan, menolak permohonan Majlis Peguam:

(1) (oleh **Nik Hashim HMP**, **Augustine Paul HMP**, bersetuju) Majlis Peguam tidak mempunyai budi bicara mutlak mengikut s 103E(4) Akta bagi mencelah pada mana-mana peringkat rayuan tanpa kawalan mahkamah ke atasnya. Majlis Peguam hanya mempunyai budi bicara untuk memutuskan pada peringkat mana prosiding di mana Majlis Peguam boleh memohon untuk mencelah mengikut Akta. Selaras dengan A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), hak untuk memberi kebenaran atau menolak suatu permohonan untuk mencelah adalah terletak pada budi bicara mahkamah. Peraturan-peraturan yang mendasarkan hak Majlis Peguam untuk mencelah di bawah s 103E(4) Akta tersebut adalah sama dengan hak mana-mana pihak yang berkepentingan untuk mencelah sepertimana yang diperuntukkan di bawah A 15 k 6 KMT (lihat perenggan 13 & 14).

(2) (oleh **Nik Hashim HMP**, **Augustine Paul HMP**, bersetuju) Mahkamah yang bertanggungjawab melaksanakan budi bicara bagi mempertimbangkan afidavit-afidavit yang difailkan Majlis Peguam, selaku pencelah, mendapati bahawa hak atau kepentingan Majlis Peguam tidak terjejas secara langsung dengan apa-apa perintah yang bakal dibuat oleh mahkamah dalam rayuan ini, kerana pihak yang terjejas secara langsung ialah pihak perayu (lihat perenggan 19).

(3) (oleh **Nik Hashim HMP**, **Augustine Paul HMP**, bersetuju) Permohonan mencelah patut dibuat pada peringkat awal lagi, iaitu ketika rayuan di Mahkamah Tinggi. Tindakan Majlis Peguam memfailkan permohonan mencelah berdasarkan afidavit sokongan adalah satu alasan yang lemah, tidak bermerit dan boleh dianggap tidak bersungguh-sungguh dalam kewajipannya. Maka kelewatan Majlis Peguam memfailkan permohonan mencelah dan tindakan mendiamkan diri sehingga ke tahap ini selama dua tahun adalah satu tindakan yang tidak munasabah untuk mewajarkan permohonan mencelah dibenarkan (lihat perenggan 21 & 22).

(4) (oleh **Nik Hashim HMP**, **Augustine Paul HMP**, bersetuju) Tindakan responden pertama menamakan perayu sebagai pihak kepada rayuan

tidak dipertikaikan dan perayu merupakan satu entiti yang ditubuhkan dan diberi kuasa masing-masing di bawah ss 93 dan 94 Akta tersebut. Sekiranya permohonan mencelah tersebut dibenarkan, maka akan wujud penduaan pihak-pihak di antara Majlis Peguam dan perayu. Malahan tindakan menamakan perayu sebagai pihak kepada rayuan ini mungkin lebih sesuai berbanding menamakan Majlis Peguam memandangkan perayu terlibat secara langsung dalam prosiding tatatertib yang melibatkan responden pertama. Undang-undang hanya memperakui pihak yang kehadirannya perlu bagi membantu perjalanan prosiding di mahkamah sahaja sebagai pihak yang layak untuk mencelah (lihat perenggan 22).

(5) (oleh **Nik Hashim HMP, Augustine Paul HMP**, bersetuju) Afidavit sokongan Majlis Peguam yang diikrarkan adalah cacat kerana deponen afidavit gagal menyatakan dengan tepat sama ada beliau berkuasa untuk mengikrarkan afidavit berkaitan dengan permohonan mencelah tersebut. Kecacatan afidavit Majlis Peguam adalah material kepada permohonannya. Oleh yang sedemikian, mahkamah berpendapat bahawa penyataan dalam afidavit tersebut tidak dibuat dengan sempurna (lihat perenggan 25).

(6) (oleh **Abdul Aziz Mohamad HMP**, menentang) Majlis Peguam boleh membuat aduan terhadap peguambela dan peguamcara dan menjadi pengadu dalam proses tatatertib berikutnya menurut s 99(3) Akta. Seterusnya, sepertimana yang diperuntukkan dalam s 103E(4) Akta di mana Majlis Peguam bukan pengadu, Majlis Peguam diberikan budi bicara untuk mencelah dan terlibat dalam rayuan. Oleh itu, jika terma 'party aggrieved' dalam s 103E(3) ditafsirkan menurut pendekatan liberal, DB tidak layak sebagai pihak yang terkilan bagi tujuan s 103E Akta (lihat perenggan 40–41).

(7) (oleh **Abdul Aziz Mohamad HMP**, menentang) Jika komen-komen Mahkamah Tinggi tentang prosedur yang digunakan oleh DB mempunyai kesan ke atas keputusannya untuk membenarkan rayuan responden pertama, maka komen-komen tersebut merupakan perkara yang membentuk sebahagian daripada merit rayuan. Oleh itu, jika DB tiada locus standi untuk memulakan rayuan ini, ia tidak mempunyai locus standi untuk menunjukkan bahawa komen-komen itu adalah salah dan bahawa, jika bukan kerana perkara komen-komen itu, Mahkamah Tinggi sepatutnya menolak rayuan itu. Jika perkara komen-komen itu tiada kesan ke atas keputusan Mahkamah Tinggi, maka ia adalah akademik dan tidak boleh mengakibatkan DB sebagai 'party aggrieved' di bawah s 103E(3) Akta (lihat perenggan 43).

[English summary

By a notice of motion encl 48(a) ('application') the Bar Council ('Bar

Council'), the proposed intervener, applied leave to intervene in this appeal under s 103E of the Legal Profession Act 1976 ('the Act'). The application was supported by the deponent's affidavit on behalf of the Bar Council whereas the first respondent objected to the application. The first respondent appealed to the High Court against the order from the appellant that convicted the first respondent for wrongdoing under s 94 of the Act and subsequently the appellant in accordance to s 103C ordered that the first respondent's name be struck out from the roll. The first respondent filed a notice of appeal against the appellant's decision in the High Court. A notice of motion to stay the appellant's order was served on the Bar Council by the first respondent. The High Court on 30 September 2005 had allowed the interim stay application against the appellant's decision. The first respondent, subsequently on 24 October 2005 served the appeal record on the Bar Council and notified the hearing date of the appeal at the High Court which had already been fixed but there was no representative from the Bar Council present on that date. The High Court allowed the first respondent's appeal. The appellant subsequently appealed to the Federal Court against the decision of the High Court. The appellant on 4 December 2006 served the appeal record on the Bar Council. On 11 December 2007, the Bar Council filed an application to obtain leave to intervene based on the provisions of s 103E of the Act which allowed the Bar Council upon its discretion to make an application at any stage of any appeal.

Held, dismissing the Bar Council's application:

1 (per **Nik Hashim FCJ**, **Augustine Paul FCJ**, concurring) The Bar Council had no absolute discretion by virtue of s 103E(4) of the Act to intervene at any stage of the appeal without the control of the court upon it. The Bar Council only had the discretion to determine at what stage the proceedings in which the Bar Council could apply to intervene according to the Act. In accordance to O 15 r 6 of the Rules of the High Court 1980 ('RHC'), the right to grant leave or to dismiss an application to intervene lies upon the discretion of the court. The rules which encompasses the Bar Council's right to intervene under s 103E(4) of the Act is similar to the right of any interested party to intervene as provided under O 15 r 6 of the RHC (see paras 13 &14).

2 (per **Nik Hashim FCJ**, **Augustine Paul FCJ**, concurring) The court which was responsible to use its discretion in considering the affidavits filed by the Bar Council, as an intervener, found that the right or interest of the Bar Council was not directly affected by any order to be made by the court in this appeal, as the directly affected party was the appellant (see paras 19).

3 (per **Nik Hashim FCJ**, **Augustine Paul FCJ**, concurring) The

application to intervene should be made at the outset, ie at the appeal in the High Court. The Bar Council's action in filing the application to intervene based on the affidavit in support was a weak reason, without merit and could be considered as not being serious in its duties. Therefore the Bar Council's delay in filing the application to intervene and its act of silence up to this stage for two years was an unreasonable act that warranted the application to intervene be allowed (see paras 21 & 22).

4 (per **Nik Hashim FCJ**, **Augustine Paul FCJ**, concurring) The first respondent's conduct in naming the appellant as a party to the appeal was not disputed and the appellant was an entity incorporated and was vested with powers respectively under ss 93 and 94 of the Act. In the event the application to intervene was allowed, there would be a duplicity of parties between the Bar Council and the appellant. Furthermore the action of naming the appellant as a party to this appeal might be more suitable than naming the Bar Council as the appellant was directly involved in the disciplinary proceedings involving the first respondent. The law only acknowledged the party whose appearance was necessary to assist the conduct of the proceedings in court as the party which was entitled to intervene (see para 22).

5 (per **Nik Hashim FCJ**, **Augustine Paul FCJ**, concurring) The Bar Council's affidavit in support which was affirmed was defective as the deponent of the affidavit failed to state precisely whether he had the power to affirm the affidavit in relation to the application to intervene. The Bar Council's defective affidavit was material to its application. Thus, the court was of the view that the statement in the affidavit was not executed properly (see para 25).

6 (per **Abdul Aziz Mohamad FCJ**, dissenting) The Bar Council may make a complaint against an advocate and solicitor and become the complainant in the ensuing disciplinary processes in accordance to s 99(3) of the Legal Professions Act 1976 ('LPA'). Further, as provided in s 103E(4) of the LPA where the Bar Council is not a complainant, the Bar Council is given the discretion to intervene and participate in the appeal. Thus, if the term 'party aggrieved' in s 103E(3) to be construed according to the liberal approach, the DB did not qualify as a party aggrieved for the purposes of s 103E of the LPA. (see paras 40–41).

7 (per **Abdul Aziz Mohamad FCJ**, dissenting) If the comments of the High Court on the procedure adopted by DB had a bearing on its decision to allow the first respondent's appeal, then the comments were matter that formed part of the merits of the appeal. Thus, if the DB had no locus standi to bring this appeal, it had no locus standi to show that the comments were wrong and that, were it not for the matter of the

comments, the High Court should have dismissed the appeal. If the matter of the comments had no bearing on the High Court's decision, then it was academic and could not render the DB a 'party aggrieved' under s 103E(3) of the LPA (see para 43).]

Nota-nota

Untuk kes-kes mengenai prosiding tatatertib, lihat 9 *Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 1589–1590.

Untuk kes-kes permohonan untuk pencelahan, lihat 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) perenggan 3700–3701.

Kes-kes yang dirujuk

Arab Malaysian Merchant Bank Bhd v Dr Jamaludin Dato' Mohd Jarjis [1991] 2 MLJ 27; [1991] 2 CLJ 862, MA (diikuti)

Attorney-General of the Gambia v Pierre Sarr N'Jie [1961] AC 617, PC (dirujuk)

Bar Council of Maharashtra v MV Dabholkar AIR 1975 SC 2092 (dirujuk)

Chan Yee v Chan Yoke Fong [1990] 3 MLJ 297; [1990] 2 CLJ 737, MA (diikuti)

Gurtner v Circuit & Anor [1968] 1 All ER 328, MR (dibeza)

Hee Awa & Ors v Syed Muhammad Sazalay & Anor [1988] 1 MLJ 300, MA (diikuti)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, MP (diikuti)

Jerald Allen Gomez v Shencourt Sdn Bhd; (Majlis Peguam, intervenor) [2006] 2 MLJ 343; [2006] 1 CLJ 88, MT (dirujuk)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (diikuti)

Undang-undang yang dirujuk

Akta Peguamcara 1961 [India] s 38

Akta Profesion Undang-Undang 1976 ss 42(1)(b), 47(1), 57(b), (c) 93, 93(1), (2), 94, 94(1), 99, 99(3), 103(4), 103C, 103E, 103E(3), (4)

Akta Profesion Undang-Undang (Pindaan) 2006 s 103E(6)

Kaedah-Kaedah Mahkamah Tinggi 1980 A 15 k 6

Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Tribunal Penyiasatan dan Jawatankuasa Tatatertib) 1994 kaedah 8(1), kaedah 23

Rayuan dari: Rayuan Sivil No R-17B–28 Tahun 2005 (Mahkamah Tinggi Kuala Lumpur)

Robert Lazar (Shearn Delamore & Co) bagi pihak bakal pencelah.
Nitin Nadkarni (Lee Hishamuddin Allen & Gledhill) bagi pihak perayu.
Harjinder Singh (Amrit Pal Singh bersama dengannya) (Harjinder & Associates) bagi pihak responden pertama.

Nik Hashim HMP (menyampaikan penghakiman majoriti):

[1] Melalui notis usul kandungan 48(a) ('permohonan'), Majlis Peguam Malaysia ('MP'), bakal pencelah, telah memohon kepada mahkamah untuk mendapatkan kebenaran bagi mencelah dalam rayuan ini di bawah s 103E Akta Profesion Undang-Undang 1976 ('Akta').

[2] Permohonan ini telah disokong oleh afidavit Lim Chee Wee, Setiausaha Kehormat MP manakala Hoo Lin Coln, responden pertama, telah membantah permohonan ini.

[3] Pada 23 Mei 2008, selepas mendengar semua pihak, mahkamah ini dengan majoriti (Abdul Aziz Mohamad HMP, menentang) telah menolak permohonan MP tanpa kos.

[4] Di dalam kes ini, responden pertama telah merayu kepada Mahkamah Tinggi terhadap perintah Lembaga Tatatertib Peguam-Peguam (perayu) bertarikh 19 Ogos 2005 yang mensabitkan responden pertama kerana salahlaku di bawah s 94 Akta. Sabitan tersebut adalah atas alasan bahawa responden pertama telah bertindak dengan tidak jujur dan secara fraud semasa melaksanakan kewajipan profesionnya, di antaranya adalah, responden pertama telah meminta agar anak guam firma Tetuan Manjit Singh, Mohammad Radzi & Partners membayar sejumlah wang kepada responden pertama tanpa pengetahuan firma tersebut. Responden pertama telah menyimpan wang tersebut untuk dirinya sendiri. Perayu telah memerintahkan agar nama responden pertama dikeluarkan daripada daftarai selaras dengan s 103C Akta.

[5] Pada 2 September 2005 responden pertama telah memfailkan notis rayuan terhadap keputusan perayu ke Mahkamah Tinggi. Notis rayuan telah diserahkan kepada MP menerusi pos berdaftar pada 6 September 2005. Notis yang sama telah diserahkan secara kediri kepada MP pada 8 September 2005. Pada 22 September 2005 pihak responden pertama telah menyerahkan notis usul untuk penggantungan perintah perayu kepada MP. Mahkamah Tinggi telah membenarkan permohonan penggantungan sementara terhadap keputusan perayu pada 30 September 2005.

[6] Pada 24 Oktober 2005, responden pertama telah menyerahkan rekod rayuan kepada MP. Menerusi surat bertarikh 10 Oktober 2005, responden pertama telah memaklumkan MP bahawa tarikh pendengaran rayuan di Mahkamah Tinggi telah ditetapkan pada 6 Februari 2006. Walau bagaimanapun, MP tidak hadir ke mahkamah pada tarikh tersebut.

[7] Pada 20 Februari 2006 Mahkamah Tinggi telah membenarkan rayuan responden pertama. Perayu kemudiannya merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Tinggi itu. Pada 4 Disember 2006, perayu telah menyampaikan rekod rayuan itu kepada MP. Mahkamah ini telah bersidang pada 23 Julai 2007, 29 Oktober 2007 dan 31 Oktober 2007 untuk pendengaran notis-notis usul kandungan 18(a), 22(a), 35(a) dan bantahan awal.

[8] Sepanjang tempoh tersebut, didapati pihak MP tidak pernah menyatakan hasrat atau hadir atau menyerahkan apa-apa permohonan untuk mencelah di dalam mana-mana peringkat yang dinyatakan di atas.

[9] Adalah diperhatikan bahawa MP melalui suratnya bertarikh 10 November 2000 menyatakan aduan Syarikat Kiew Brothers ('aduan pertama') terhadap responden pertama dianggap tutup selepas syarikat tersebut menarik balik aduannya. Memandangkan aduan pertama itu secara substansialnya serupa sebagaimana aduan dalam kes ini, sepatutnya MP boleh bertindak terhadap aduan pertama tersebut. Namun demikian, MP memilih untuk tidak mengambil apa-apa tindakan. Hanya pada 11 Disember 2007, barulah MP memfailkan permohonan untuk kebenaran bagi mencelah.

[10] Peguam yang bijaksana bagi pihak MP dalam hujahannya menyatakan bahawa peruntukan s 103E Akta membolehkan MP atas budi bicaranya membuat permohonan pada mana-mana peringkat dalam mana-mana rayuan. Beliau memetik keputusan Privy Council dalam kes *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, untuk menyokong hujahannya.

[11] Juga diperhatikan bahawa peruntukan s 103E Akta telah dipinda menerusi Akta Profesion Undang-Undang (Pindaan) 2006 ('Akta A 1269') yang berkuatkuasa mulai 2 Oktober 2006 vide PU(B) 248/2006. Walau bagaimanapun, oleh kerana kes ini telah berlaku sebelum kuatkuasanya pindaan tersebut, maka s 103E(4) yang lama adalah terpakai. Tambahan pula, pindaan tersebut tidak menyatakan ia berkuatkuasa kebelakangan. Menerusi Akta A1269, peruntukan itu sekarang terkandung dalam s 103E(6) Akta.

[12] Seksyen 103E(4) Akta memperuntukkan bahawa:

> (4) Majlis Peguam *boleh atas budi bicaranya mencelah pada mana-mana peringkat* apa-apa rayuan di bawah seksyen ini.

(Penekanan ditambah.)

(The Bar Council may in its discretion intervene at any stage of any appeal under this section).

[13] Seksyen 103E(4) Akta memperuntukkan bahawa MP boleh atas budi bicaranya mencelah pada mana-mana peringkat rayuan ini. Ayat *boleh atas budi bicaranya mencelah pada mana-mana peringkat* bukan bererti budi bicara mutlak MP untuk mencelah pada mana-mana peringkat tanpa kawalan mahkamah keatasnya. Ayat itu hanya memberi MP budi bicara untuk memutuskan pada peringkat mana presiding di mana MP boleh memohon untuk mencelah di bawah s 103E(4) Akta. Tafsiran ini adalah selaras dengan A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang mana hak untuk memberi kebenaran atau menolak suatu permohonan untuk mencelah adalah terletak kepada budi bicara mahkamah (lihat *Malaysian High Court Practice* – 2001 Desk Ed 1 (perenggan: 15.6.3) ms 365).

[14] Oleh yang demikian, saya bersetuju dengan hujahan peguam yang bijaksana bagi pihak responden pertama bahawa peraturan-peraturan yang mendasari hak MP untuk mencelah di bawah s 103E(4) Akta adalah sama dengan hak mana-mana pihak yang berkepentingan untuk mencelah sepertimana diperuntukkan di bawah A 15 k 6 KMT. Jadi, prinsip yang terpakai bagi mahkamah menimbang permohonan di bawah s 103E(4) Akta adalah sama dengan permohonan yang dibuat di bawah A 15 k 6 KMT.

[15] Selain daripada kes *Pegang Mining Co Ltd*, terdapat juga autoriti-autoriti lain yang memperjelaskan mengenai prinsip-prinsip undang-undang yang digunapakai oleh mahkamah dalam mempertimbangkan permohonan untuk mencelah. Di antara autoriti-autoriti tersebut adalah:

(i) *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 (MP);

(ii) *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300 (MA);

(iii) *Chan Yee v Chan Yoke Fong* [1990] 3 MLJ 297; [1990] 2 CLJ 737 (MA); dan

(iv) *Arab Malaysian Merchant Bank Bhd v Dr Jamaludin bin Dato' Mohd Jarjis* [1991] 2 MLJ 27; [1991] 2 CLJ 862 (MA).

[16] Di antara prinsip-prinsip yang telah diputuskan di dalam kes-kes di atas ialah:

(i) Permohonan untuk mencelah boleh dibuat pada mana-mana peringkat prosiding dan ia hendaklah dibuat secepat mungkin (*Hong Leong Bank Bhd*).

(ii) Permohonan hendaklah disokong oleh afidavit yang menyatakan persoalan atau isu yang timbul di antara pencelah dan pihak-pihak kepada prosiding (*Hong Leong Bank Bhd*).

(iii) Tujuan utama mencelah ialah untuk menghalang penduaan di dalam prosiding (*Chan Yee*).

(iv) Pemohon yang dijadikan pihak mestilah pemohon yang sepatutnya dijadikan pihak atau yang kehadirannya di mahkamah perlu bagi memastikan semua hal-hal yang dipertikaikan dapat diputuskan dan diadili sepenuhnya dengan berkesan (*Hee Awa & Ors*).

(v) Pemohon dibenarkan mencelah jika pemohon akan terjejas secara langsung dengan hak undang-undangnya atau kepentingan peribadinya (*Arab Malaysian Merchant Bank Bhd*).

[17] Berdasarkan prinsip-prinsip di atas, mahkamah, dalam melaksanakan budi bicaranya sama ada untuk membenarkan sesuatu permohonan mencelah ataupun tidak, mestilah mengambilkira kepada ujian: 'adakah hak atau liabiliti sesuatu pihak terhadap mana-mana pihak kepada tindakan yang menjadi perkara pokok kepada tindakan tersebut akan terjejas secara langsung dengan apa-apa perintah yang boleh dibuat dalam tindakan itu?' ('will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?') (*Pegang Mining Co Ltd*).

[18] Budi bicara mahkamah atau dipanggil juga budi bicara kehakiman bermakna suatu penghakiman mahkamah yang dilaksanakan oleh hakim atau mahkamah berdasarkan apa yang adil dalam sesuatu hal keadaan serta berpandu kepada kaedah-kaedah dan prinsip-prinsip undang-undang. (sila lihat 'judicial discretion' *Black's Law Dictionary* (7th Ed 1999 ms 479).

[19] Adalah menjadi tanggungjawab mahkamah ini dalam melaksanakan budi bicaranya untuk mempertimbangkan permohonan berasaskan afidavit-afidavit yang difailkan oleh pihak-pihak berkaitan. Dan semestinya pertimbangan terhadap afidavit-afidavit yang difailkan itu melihat kepada kepentingan MP selaku bakal pencelah dalam hal kes ini, sama ada hak atau kepentingan MP terjejas secara langsung dengan apa-apa perintah yang bakal dibuat oleh mahkamah dalam rayuan ini. Di dalam keputusan Mahkamah Agong dalam kes *Arab Malaysian Merchant Bank Bhd*, Gunn Chit Tuan HMA telah memetik *dictum* Lord Denning MR, di dalam kes Mahkamah Rayuan Inggeris *Gurtner v Circuit & Anor* [1968] 1 All ER 328 yang menyatakan:

> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its

A discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome.

B Melihat kepada kandungan afidavit-afidavit MP yang difailkan, saya tidak nampak apa-apa kepentingan yang akan terjejas secara langsung oleh MP dengan rayuan ini, kerana pihak yang terjejas secara langsung ialah pihak perayu.

C **[20]** Seawal 24 Oktober 2005 lagi, pihak MP sudah menyedari wujudnya rayuan ke Mahkamah Tinggi. Dan pada 4 Disember 2006, MP sedia maklum mengenai rayuan di Mahkamah Persekutuan. Namun demikian, MP memilih untuk berdiam diri, satu isyarat bahawa MP tidak berminat terhadap kemajuan kes ini.
D

[21] Ini ditambah lagi dengan kandungan afidavit Lim Chee Wee, satu-satunya deponen bagi pihak MP, yang bercanggah di antara satu dengan yang lain. Dalam afidavit sokongannya, MP menjelaskan bahawa alasan
E kelewatan dalam membuat permohonan adalah disebabkan MP tidak dimaklum dengan tarikh pendengaran rayuan di Mahkamah Tinggi dan di Mahkamah Persekutuan. Walau bagaimanapun, dalam afidavit lanjutan, MP menjelaskan bahawa MP hanya akan mencelah sekiranya pengadu, Wong Weng Woh (responden kedua) tidak lagi berminat untuk meneruskan
F rayuannya.

[22] Sewajarnya permohonan patut dibuat pada peringkat awal lagi, iaitu ketika rayuan di Mahkamah Tinggi. Tindakan MP memfailkan permohonan atas alasan sebagaimana dinyatakan dalam afidavitnya: '... amalan Majlis
G Peguam untuk hanya mempertimbangkan sama ada untuk mencelah dalam mana-mana rayuan dalam kes-kes dimana pengadu asal dalam prosiding tatatertib tidak lagi berminat sama ada untuk meneruskan atau untuk membela rayuan dan dalam keadaan-keadaan istimewa...', adalah satu alasan
H yang lemah dan tidak bermerit. Jika itu alasannya, maka MP bolehlah dianggap tidak bersungguh-sungguh dalam kewajipannya. Oleh itu, kelewatan MP memfailkan permohonan dan tindakannya iaitu mendiamkan diri sehingga ke tahap ini selama dua tahun (24 Oktober 2005 hingga 11 Disember 2007) adalah satu tindakan yang tidak munasabah untuk
I mewajarkan permohonan dibenarkan.

[23] MP juga di dalam afidavitnya menyatakan wujudnya keadaan istimewa yang menjustifikasikan permohonannya untuk mencelah. Namun demikian, MP tidak menyatakan apakah keadaan istimewa tersebut. Adakah

status responden kedua yang tidak lagi berminat untuk meneruskan rayuannya tergolong dalam keadaan istimewa? Sekiranya benar, itu hanyalah satu 'ipse dixit' di pihak MP.

[24] Responden pertama telah menamakan perayu sebagai pihak responden di dalam rayuannya di Mahkamah Tinggi. Malahan tindakan responden pertama menamakan perayu sebagai pihak kepada rayuan tidak dipertikaikan oleh mana-mana pihak. Dan satu faktor yang paling penting ialah perayu merupakan satu entiti yang ditubuhkan dan diberi kuasa masing-masingnya di bawah ss 93 dan 94 Akta. Oleh yang demikian, sekiranya permohonan ini dibenarkan, maka akan wujudlah penduaan pihak-pihak di antara MP dan perayu. Malahan tindakan menamakan perayu sebagai pihak kepada rayuan ini mungkin lebih sesuai berbanding menamakan MP memandangkan perayu terlibat secara langsung dalam prosiding tatatertib yang melibatkan responden pertama. Undang-undang hanya memperakui pihak yang kehadirannya perlu bagi membantu perjalanan prosiding di mahkamah sahaja sebagai pihak yang layak untuk mencelah. Ini adalah sejajar dengan prinsip yang dinyatakan oleh Mohamed Azmi HMA dalam keputusan Mahkamah Agong di dalam kes *Hee Awa & Ors*, di ms 301 berkata:

> The person to be added as a party must be a person who ought to have been joined as a party or whose presence in court is necessary to ensure that all matters in dispute may be 'effectually and completely determined and adjudicated upon'.

[25] Selain daripada itu, afidavit sokongan MP yang diikrarkan oleh Lim Chee Wee juga nampaknya cacat. Ini kerana, deponden afidavit ini gagal menyatakan dengan tepat sama ada beliau berkuasa untuk mengikrarkan afidavit-afidavit tersebut atau sebaliknya. Ini kerana perenggan 16 afidavit Lim Chee Wee yang diikrarkan pada 21 Mei 2008 menyatakan:

> ... keputusan sama ada untuk mencelah dalam apa-apa perkara adalah didelegasikan oleh Majlis Peguam kepada sebuah jawatankuasa yang terdiri daripada.... (kosong)...

[26] Deponen afidavit ini tidak pula menyebutkan apakah jawatankuasa yang membuat keputusan dan apakah komposisi jawatankuasa tersebut. Kecacatan afidavit MP ini adalah material kepada permohonannya. Oleh yang demikian, mahkamah berpendapat bahawa pernyataan dalam afidavit tersebut tidak dibuat dengan sempurnanya.

[27] Berdasarkan alasan-alasan tersebut, maka mahkamah atas budi bicaranya telah menolak permohonan MP dengan sewajarnya.

A **[28]** Yang Arif Augustine Paul, HMP telah membaca draf alasan penghakiman ini dan bersetuju dengannya.

Abdul Aziz Mohamad FCJ (delivering dissenting judgment):

B

[29] Of the several grounds of the first respondent's preliminary objection, that which I find merits consideration the most is that, viewed against the legislative backdrop of the Legal Profession Act 1976 ('the LPA') and the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and C Disciplinary Committee) Rules 1994 ('the 1994 Rules'), disciplinary proceedings against an advocate and solicitor are adversarial in nature and that therefore the 'party aggrieved' in s 103E of the LPA must refer to one of the adversaries, which in the case of an appeal to this court, as the present appeal is, must be the complainant, who is the second respondent here, and D cannot be the adjudicating Disciplinary Board ('DB') itself.

[30] The position taken by the appellant DB as to that ground is expressed in para 3 of its outline submission:

E > 3. With respect, this submission is based on a misunderstanding of the nature of disciplinary proceedings. In proceedings relating to the discipline of professionals, there are no parties in the commonly understood meaning of the word where one party is seeking some sort of relief. There is no lis, or inter partes controversy, akin to a criminal prosecution or civil dispute.

F

[31] That statement was, I believe, inspired by certain pronouncements in *Attorney-General of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 ('the *Gambian* case') and *Bar Council of Maharashtra v MV Dabholkar* AIR 1975 SC 2092 ('the *Indian* case'). In the *Gambian* case Lord Denning said at p 631: G 'When the judges exercise their power to suspend or expel, they do not decide a suit between parties. There is no prosecution as in a criminal case, nor any plaintiff as in a civil suit.' In the *Indian* case A N Ray CJ said at para 24: '… there is no lis in proceedings before the disciplinary committee. When the disciplinary committee exercises the power to reprimand the advocates, or H suspend the advocate from practice or remove the name of the advocate, the committee does not decide a suit between the parties.'

[32] But those pronouncements are not the expression of a universal norm as to the nature of disciplinary proceedings against legal practitioners. They I were made in the context of the state of the relevant legislation in the jurisdiction concerned. Were it clear from our legislation, from express words or by necessary implication, that in Malaysia disciplinary proceedings against advocates and solicitors are adversarial in nature, those pronouncements will immediately be seen as incapable of applying to us.

[33] I do not think that it is a matter beyond controversy that in Malaysia disciplinary proceedings against an advocate and solicitor are not adversarial in nature. There are indications tending otherwise in the LPA and the 1994 Rules. But I do not intend to go into them or to decide the question because I find that, even assuming that there is no lis or inter parties controversy in disciplinary proceedings under the LPA, the DB's reasons for claiming to be a 'party aggrieved' under sub-s (3) of s 103E of the LPA are unacceptable. I will only say that, in my view, contrary to what is stated in para 25 of the DB's outline submission, in *Jerald Allen Gomez v Shencourt Sdn Bhd; (Majlis Peguam, intervenor)* [2006] 2 MLJ 343; [2006] 1 CLJ 88 the High Court did not decide that disciplinary proceedings against an advocate and solicitor are non-adversarial. What happened in that case was that the disciplinary committee heard the advocate and solicitor first in his defence and it was only thereafter that the complainant company's representative propounded his complaint and was cross-examined by the advocate and solicitor. It was argued for the advocate and solicitor that such a procedure was unfair because the complainant company had a burden to prove its case beyond reasonable doubt and must discharge that burden before the advocate and solicitor could be called upon to enter upon his defence. The High Court (of three judges) said at p 99:

> In our view there is nothing irregular or unfair in the procedure adopted by the disciplinary committee. The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court. This is not a criminal trial but a disciplinary proceedings. So long as it is seen that 'fair play is in action' to borrow Lord Morris' words, and that the procedures applied are just and fair, then, in this court's view, it cannot be said that the disciplinary committee had committed a breach of procedural fairness.

It was an opinion about fairness of procedure and not about whether the proceedings before the disciplinary committee were adversarial. The High Court merely said that the proceedings 'need not emulate the strict adversarial procedure practised in a criminal court'. That does not equate with saying that the proceedings were non-adversarial.

[34] The DB's essential reason for claiming to be a 'party aggrieved' may perhaps best be stated by quoting certain words from paras 27 and 30 of the *Indian* case, since heavy reliance seems to be placed on the case in making the claim. In para 27, in relation to the meaning of 'a person aggrieved' in a statute that creates a right of appeal to courts against an administrative or judicial decision and that gives that right to a 'person aggrieved', it is stated: 'A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality.' The liberal approach that should be adopted in construing s 103E of our statute is to encompass within the term 'party aggrieved' a person who, to quote from para 30 of the *Indian* case, 'represents the collective conscience

of the standards of professional conduct and etiquette' of advocates and solicitors or 'acts as the protector of the purity and dignity of the profession'.

[35] In the *Indian* case it was held that the Bar Council of Maharashtra was such a person. Its disciplinary committee had suspended certain advocates and solicitors from practice for three years. On their appeal to the Bar Council of India, its disciplinary committee set aside the orders of the disciplinary committee of the Bar Council of Maharashtra, which sought to appeal to the Supreme Court as a 'person aggrieved' under s 38 of the Advocates Act 1961.

[36] In the present case, the DB claims that it is such a person. The DB was established by amendments to the LPA by the Legal Profession (Amendment) Act 1992 (Act A812) to take over the control and disposal of disciplinary actions against advocates and solicitors which had been in the domain of the Bar Council, because of public dissatisfaction with its performance in the disposal of complaints against advocates and solicitors. In para 12 of the DB's outline submission, it is submitted that the amendments transferred the responsibility for the discipline of lawyers from the Bar Council to the Disciplinary Board.

[37] That is essentially true. Subsection (1) of s 93 does state in effect that the DB is established for 'the purposes of disciplinary proceedings' under Part VII of the LPA. Subsection (1) of s 94 subjects all advocates and solicitors to the control of the DB, but 'for the purposes of all disciplinary actions'. It is clear from s 99 that the DB only acts on a complaint that is made or referred to it, which it is required to deal with in accordance with rules made under Part VII.

[38] But what may be understood from those provisions to be the function of the DB, of great importance though it undoubtedly is, does not, in my opinion, make the DB the person, to quote the words in the *Indian* case again, who 'represents the collective conscience of the standards of professional conduct and etiquette' of advocates and solicitors or 'acts as protector of the purity and dignity of the profession'. The person who meets that description is, in my view, the Bar Council, which, under sub-s (1) of s 47 of the LPA, is responsible for the proper performance of the functions of the Malaysian Bar, one of whose functions is, under para (b) of sub-s (1) of s 42, 'to maintain and improve the standards of conduct and learning of the legal profession of Malaysia'. In addition, under paras (b) and (c) of s 57, the Bar Council has specific powers 'to answer questions affecting the practice and etiquette of the profession and the conduct of members', 'to take

cognizance of matters affecting … the professional conduct' of members of the Malaysian Bar, and to 'take any action as it considers fit' in relation to 'the interests of the profession'.

[39] With those functions and powers, if, for example, there is public dissatisfaction with the conduct generally of members of the legal profession, it becomes the concern of the Bar Council to find ways and means to improve matters so as to restore public confidence in the profession and the dignity of the profession. It is not the concern of the DB, whose function is only in relation to actual complaints of misconduct that fall into its lap. It is answerable for the disposal of the complaints. It has not the higher function of worrying about the good name and dignity of the profession. That is the function of the Bar Council. Subsection (2) of s 93, which says: 'The Disciplinary Board shall have the same powers as those exercised by the Bar Council before the coming into force of this Act', has to be construed as referring to powers relating to the conduct of disciplinary proceedings and cannot be construed as effecting the transfer of the Bar Council's higher function to the DB.

[40] It is a reflection of that higher function of the Bar Council that in the realm of actual disciplinary proceedings the Bar Council is enabled to play certain important roles. Apart from the usual run of individual complainants, the Bar Council itself, under sub-s (3) of s 99, may make a complaint against an advocate and solicitor and become the complainant in the ensuing disciplinary processes. Under para (1) of rule 8 of the 1994 Rules, where a complaint by a person has been withdrawn the Bar Council is empowered to proceed with the complaint as if it was made of its own motion, and become the complainant in the ensuing disciplinary proceedings. Under sub-s (4) of s 103E, in an appeal under the section in a case where the Bar Council is not the complainant, the Bar Council is given the discretion to intervene and participate in the appeal.

[41] For those reasons, even if the term 'party aggrieved' in sub-s (3) of s 103E has to be construed according to the liberal approach that, according to the *Indian* case, has to be adopted in the case of a statute dealing with professional conduct, I am of opinion that the DB does not qualify as a party aggrieved. In this I am in agreement with the conclusion of my learned brother Augustine Paul FCJ that the Disciplinary Board is not a 'party aggrieved' for the purposes of s 103E.

[42] I am, however, with respect, unable to find, as my learned brother does, that the DB is nevertheless a 'party aggrieved' because an order for costs was made against it by the High Court. Although in oral submission the DB's counsel did include the order for costs as a ground for claiming the DB to be

A a 'party aggrieved', in the outline submission that was subsequently prepared on our direction to encapsulate the oral submission, this point has not been urged. I take it that it has been abandoned, and I think rightly, because the DB's memorandum of appeal, even as amended, does not include the order for costs as a ground of appeal.

B

[43] What has been urged in the DB's outline submission as an additional ground — but admitted as 'a narrow ground' — for claiming the Disciplinary Board to be a 'party aggrieved' is the allegation that the High Court made several comments on the procedure adopted by the Disciplinary Committee,
C comments allegedly made on the High Court's interpretation of rule 23 of the 1994 Rules as a rule that makes the proceedings a formal trial between two parties, which interpretation is viewed as conflicting with the perceived opinion of the High Court in the *Jerald Gomez* case, that the proceedings are non-adversarial, as to which I have said that the High Court did not so opine.
D It is submitted that the DB is a 'party aggrieved' because it has an interest to obtain a final decision as to the proper procedure to be adopted in the future. If the said comments of the High Court in this case have a bearing on its decision to allow the first respondent's appeal, then the comments are a matter that forms part of the merits of the appeal. If the DB has no locus
E standi to bring this appeal, it has no locus standi to show that the comments are wrong and that were it not for the matter of the comments the High Court should have dismissed the appeal. If the matter of the comments has no bearing on the High Court decision, then it is academic. The merely academic need to have a determination of a point of law or procedure for
F future guidance cannot, in my opinion, by any stretch of the imagination or of argument, render the DB a 'party aggrieved' under sub-s (3) of s 103E.

[44] I would allow the preliminary objection.

G *Permohonan ditolak.*

Reported by Mashrifah Ravendran

H

I